Robert Clarke & Co., Prs., 65 West Fourth Street, Cin., O. [*April*, 1875.

IN THE

Superior Court of Cincinnati.

The City of Cincinnati,
Plaintiff,

vs.

The Cincinnati Street Railroad Company,
Defendant.

W. Y. GHOLSON'S ARGUMENT

for Defendant.

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STATEMENT OF CASE AND ARGUMENT OF HON. W. Y. GHOLSON,

For Defendant.

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Defendant.

ACTION FOR SPECIFIC RELIEF.

STATEMENT OF CASE.

The petition in this case was filed on the 3d day of September, A. D. 1866. On the 19th of September, of said year, an amended petition was filed, which recited that the said plaintiff, being authorized by the general corporation act of the State of Ohio, passed May 1, 1852, and under the twelfth section of said act, as amended April 15, 1857, to agree with street railroad companies as to the manner and upon the terms and conditions upon which said companies might occupy and use the streets of Cincinnati, did, on the 1st day of July, A. D. 1859, pass an ordinance, whereby the city proposed to advertise for ten days, stating the routes which had been designated by council for street railroads, and asking for sealed proposals to construct—the party that would pay the highest

amount of car license per annum, and the highest amount for each passenger carried, and bid for the lowest price of commutation tickets in packages of not less than twenty-five, to be considered the successful bidder. That the defendant bid for the route now known and designated as Route No. 2, offering to sell to passengers, who should demand them, packages of tickets of not less than twenty-five for the sum of one dollar, and was declared by the city council to be the successful bidder for said route, and was awarded the same upon the said terms.

That afterward, on the 6th day of August, 1859, the defendant executed and delivered its obligations to the city, whereby, in consideration of the grant by the city to it of the privilege to construct and operate a street passenger railroad on the said route, the defendant agreed to abide by and perform all the provisions, requirements, and conditions of said ordinances of July 1, 1859, and of the resolutions and other ordinances of the city council, upon the subject of street railroads, passed and to be lawfully passed by the city council.

That the defendant afterward constructed and operated on said route a street railroad, and had continued to the time of the filing of the petition to run cars thereon, and did sell, and was accustomed to sell, packages of twenty-five tickets for one dollar to all passengers on said cars who applied for the same.

That subsequently to the 10th day of April, 1861, and prior to the commencement of this action, the defendant corporation reorganized as a corporation, under the law of April 10, 1861.

That the said contract was variously modified, and the

modifications were agreed to by the city and ratified by the defendant.

That on the 10th day of June, 1864, said city council passed an ordinance entitled "an ordinance regulating the sale of package tickets on street passenger railroads within the city of Cincinnati," the first section of which ordains "that each street passenger railroad company within said city be required to keep for sale, by the conductor or driver of each car, package tickets of the required number for one dollar, to be ready for delivery at all times during the running of the cars to passengers applying for the same."

And that in the year 1864 the Congress of the United States passed the United States revenue law, the 103d section of which provides that "street railroad companies should be subject to and pay a duty of two and one-half per centum upon the gross receipts of said roads, and that said companies should have the right to add said duty to their rates of fare, any agreement to the contrary notwithstanding."

That afterward, on March 3, 1865, Congress amended said revenue act, and enacted "that whenever, under the proviso to section 103, the addition to any fares shall amount to a sum involving the fraction of one cent, any person or company liable to the duty of two and one-half per cent., as in said section provided, shall be authorized to add to such fare one cent in lieu of such fraction."

That Congress further amended said law, to the effect "that whenever the addition to any fare shall amount only to the fraction of one cent, any person or company liable to the tax of two and one-half per centum may add to such fare one cent in lieu of such fraction, and such person or company shall keep for sale, at convenient points, tickets in packages of twenty and multiples of twenty, to the prices

of which only an amount equal to the revenue tax shall be added."

Plaintiff then alleges that from the —— day of ——— to the filing of the petition, the defendant, in violation of its contract with the city of Cincinnati and the ordinances and resolutions aforesaid, and under the pretense that the said acts of Congress authorized the charge of one dollar and twenty-five cents for a package of twenty-five tickets, or one dollar for a package of twenty tickets, has daily refused, and still refuses, to sell to passengers on said cars, or at the office of the company, or elsewhere, twenty-five tickets in one package for one dollar and three cents, or multiples of twenty at that rate, as by law and contract bound to do.

And plaintiff therefore asked a judgment and order of the Court declaring that the defendant is, by law and contract, bound to furnish to every person applying, tickets in packages of twenty-five for one dollar and three cents, and is bound to sell same on the cars, and enjoining defendant from refusing and neglecting to comply with its said contract in the particulars aforesaid, and from demanding or requiring from any person or persons payment at any greater rate than as aforesaid, for tickets in packages, whether containing twenty-five or a greater or less number.

Or that otherwise the Court would order and adjudge said contract between the plaintiff and defendant to be rescinded, canceled, and annulled, and the defendant be enjoined from claiming or exercising any rights or privileges under the same, and from using and occupying the streets of the city; and that in the meantime a provisional order be issued restraining defendant as above prayed, with respect to the sale of tickets.

On the 22d day of September of said year, in chambers, before the Honorable Alphonso Taft, upon a motion of the plaintiff, a provisional order of injunction, notice thereof having been served upon the defendant, and the same having been heard on the petition and the amendment thereto, and the affidavit of Joseph Torrence, and having been argued by counsel, was granted as prayed for, the order to take effect upon the plaintiff entering into an undertaking, with approved sureties, to the amount of twenty thousand dollars; but nothing in the order was to prevent the defendant from demanding and receiving, until the 3d day of April, 1867, the sum of six cents for single fares.

On the same day the bond was given.

And afterward, on the 20th day of October, A. D. 1866, the defendant filed a general demurrer to the petition, which, on the 16th day of December, 1867, was overruled. Thereupon, on same day, defendant filed its answer, stating that it was a body corporate originally organized under the general corporate act of May 1, 1852, for the purpose of constructing a railroad from the town of Cumminsville, in the county of Hamilton, Ohio, to the town of Pendleton, in said county, through such streets in the city of Cincinnati as said company should select. That said original organization took place on the 6th day of November, 1858, after which, on or about the 17th day of said month and year, the company selected certain streets in said city for its main track, and applied to the city council for permission to occupy the same, in pursuance of the 12th section of said act; that prior to the 10th day of April, 1861, an agreement was entered into between the city and defend-

ant for the use and occupation of said streets by defendant's tracks.

That among the stipulations in said agreement was one that said company should sell commutation tickets in packages of not less than twenty-five for one dollar; and the defendant submitted to the Court whether said stipulation was within the power of the said city council to exact, under the provisions of the said 12th section of said general corporation act.

That the city council, at the time of said agreement, assumed the power to lay out routes, and to prescribe the terms on which individuals and companies might lay and operate street railroads within said city, and of fixing the rates of toll or fare to be charged, and of levying a tax of one cent for each passenger carried.

That thereupon the said city council made grants of the routes so laid out to various individuals and companies, and street railroads were constructed and operated prior to the 10th day of April, 1861. That doubts having arisen as to the power of the said city council to make said grants, and of the validity of the organization of such street railroad companies, the General Assembly of the State passed, on said 10th day of April, 1861, an act entitled "an act to provide for and regulate street railroad companies," under the sixth section of which the defendant, on the 1st day of June, 1861, was reorganized, and has and possesses all the rights, powers, privileges, and benefits in said act granted and conferred, the same as if originally organized and incorporated under the same. That it operates and maintains its railroad under said act.

That while it is not bound by law or agreement to sell tickets at other places than its offices, nevertheless, by a

regulation of the company, made on the 11th day of April, 1865, it was provided that, on and after said day, the rates of fare, when paid on the cars, should be as follows: Single fares, 6 cents; tickets, in packages of twenty, $1; in packages of ten, 50 cents, and in packages of five, 25 cents; which regulation was printed on a card, and posted in all the cars of said company, and was in force until the 26th day of August, 1866, when the company made a new regulation, by which single fares should be six (6) cents, and tickets in packages of twenty, or multiples of twenty, to be kept for sale at convenient points, for one dollar ($1), in packages of twenty; which regulation was also printed on a card, and posted up in all the cars.

That said regulation was carried out, and was in full force when the original and amended petitions were filed and the said restraining order made, and that said regulation and the rates of fare thereby fixed were reasonable.

Then follows in the answer a general denial of all the allegations of both petitions, and a prayer that the action be dismissed at the costs of the plaintiff, for which judgment is asked.

To this answer the city filed a general demurrer, which, on the 4th day of January, A. D. 1868, was sustained, and it was ordered that the injunction granted on said 22d day of September, 1866, be made perpetual, to which the defendant excepted, and by petition in error removed the case to the Superior Court of Cincinnati in general term.

The petition in error was filed on the 16th day of December, A. D. 1868, and afterward, on the 6th day of January, A. D. 1869, in general term, the case came on to be heard on said petition in error, on consideration whereof,

the Court ordered and adjudged that the judgment of the Court at special term be affirmed, with costs.

The case was orally argued by Stanley Matthews and H. A. Morrill for the plaintiff, and by W. Y. Gholson and E. A. Ferguson for the defendant, on September 3, 4, 5, 6, and 7, 1866, before Hon. Judges Storer, Taft, and Fox.

Subsequently, the defendant was allowed by the Supreme Court to file a petition in error to review the said judgments at special and general term.

ARGUMENT OF W. Y. GHOLSON.

September 3, 1866.

I understand, may it please your Honors, this case to be an application for a preliminary injunction, an injunction pending the suit. The suit is, as it were, just commenced. I do not know that the petition is filed; the pleadings are not filed. I believe the code gives a party the liberty to apply for an injunction at the commencement of the suit.

The questions that we propose to present, in response to this application, may be classed under two heads. We ask the Court, first, to examine the nature of this contract, and we do it with this view: We assume it to be a perfectly clear principle of law that the Court will not grant an injunction upon any claim brought forward in the nature of a legal claim, which this must be considered to be, unless the Court is satisfied there is a legal claim. They are first required to establish their claim. When it depends upon a question of law, instead of a question of fact, that is not necessary; but in cases of doubt, the Court will not interfere by injunction.

First, I will ask the Court to consider the character of this alleged contract, and ascertain whether the stipulation which is sought to be enforced by injunction, is a legal stipulation—whether it is so clearly a legal stipulation as to entitle the party to this remedy of injunction for its enforcement. And having examined that part of the case, as to the nature and character of the claim set up here, so that the Court may satisfy themselves upon that point, we pro-

pose to claim in addition, that if the Court see fit, if this claim be considered sufficiently clear to entitle the party to a remedy of this extraordinary character, then the question arises as to whether it is a claim or contract of that description to be enforced by such a remedy as this. That is the last argument of the gentleman who has addressed you, in reference to selling the commutation tickets at a fixed price. He has insisted that it could be enforced by this remedy of injunction.

A further inquiry will be, whether you can enforce by injunction, in a case of this sort, by a preliminary step; and then we go further—to a point which my friend did not argue—whether the thing done, or the injury sustained, is of that impending, serious character and nature which entitles the party to remedy by injunction. Because it is not every injury which entitles a party to this remedy during the pending of the suit; he must show that there is an injury impending to the plaintiff. Now, it is not claimed that there are any damages coming to the city at all. When a party comes to the Court, and says I do not expect to have any damages, the injury is not to me but to other parties, I take it that that is no case for an injunction. That is the second branch of this argument.

As to the first part to which I propose to address myself, with regard to the power of the city of Cincinnati to contract with the street railroad companies for the regulation of the tolls and fares, and for a commutation in favor of individuals, if your Honors please, there is no dispute between us. I know there was a doubt felt by many whether there could be any organization of street railroads under the act of 1852; but they were organized under that act, and this contract was made under the authority of the 12th

section of that act. Subsequent legislation has taken place, and it contains a provision precisely similar as to using the right of way in the streets. I suppose there is no dispute between us as to this proposition, that the power to contract between a city and a railroad corporation is limited. The only power on which reliance could be had at the time the contract professes to have been made, was that contained in the 12th section of the act of May 1, 1852, as amended in 1857. There is no dispute, I apprehend, between us as to this. Whatever powers the city had, to make the contract, or the railroad corporation to make the contract, were derived under that section of the statute. The railroad company, as a corporation for the construction and maintenance of a railroad, could only derive its power under that act, or some section contained in a subsequent act; its only power to contract for the use of the streets is derived under that or a similar section.

Now, its franchise to be a corporation, and to contract with a corporation, proceeded from the legislature, and could not be conferred by the city. I do not know that I need argue that question. It was not competent for the city of Cincinnati to grant to a corporation, or to confer upon any railroad company, the right to use these streets, and to exact toll; but we will not argue that now. Certainly no corporation could make a contract of that sort, unless express legislative power could be shown for it. There was no provision of the law pointed out, nor is there any which can be pointed out, except this 12th section of that act. You may search all the statutes, and you can find no authority to make a contract, either on the part of the city or the railroad company, unless in that 12th section of that act. The franchise to be a corporation, and to construct and

operate a railroad, and to charge toll, was derived from the legislature, not from the city.

And then, if your Honors please, it was to secure, not a franchise, but the enjoyment of the franchise, that it became necessary for the railroad company to deal with the city.

Now, this matter was considered in the cases in 10 Ohio St. 372, and in 15 Ohio St. 21–36, and your Honors will observe that this preliminary agreement with the city is followed by an authority to condemn; and the question which arose in those two cases was, what was that power to contract and to condemn? And the Court say that it is not a franchise; it is not in the nature of a franchise or grant from the legislature, but it presupposes a grant obtained in the regular way; and this is a means, say those authorities, of securing the enjoyment of the franchise derived from the legislative grant. And as shown by those authorities, and by the very nature of the case, that was the legal purpose for which these parties were authorized to contract.

I ask the particular attention of your Honors to that fact, that the legal purpose for which they were authorized to contract, was to secure the enjoyment of the franchise obtained, under the act of the legislature, to construct and operate a railroad and charge tolls upon it. That was the means pointed out by the legislature for the purpose of securing the enjoyment of the grant derived under legislative authority. It was a step in the progress of effecting a legislative grant.

I call your Honors' attention to this principle, because nothing should be done under the pretense of this contract that should impede or destroy the legislative grant, as se-

cured under the general law of the State authorizing corporations; although it was competent for the city of Cincinnati to assist such corporations that should have such a grant with all her power, if she saw fit, by affording the requisite means.

A grant was made involving the use of land. It was the grant to be a railroad corporation, and necessarily involved, for securing the enjoyment of the grant, the use of land; that use was admitted to be a public use—one for which the legislature might authorize the municipal authorities to contract. The land required, then, might be subject to other public uses, as in this case; the land that the railroad company was authorized to obtain, and in relation to which the city of Cincinnati was authorized to contract, was all subject to other public uses, and, in view of such uses, as this section of the act contemplated, might be under the charge of corporate and municipal authorities; and, therefore, if you look at the law read by the gentleman, it provides for streets or roads owned by or in the charge of corporate authorities.

Now, the gentleman admitted in his argument a question frequently decided in this Court. We do not care about the fee of the streets. The streets are held by the city as trustee for these public uses; and the city, as holder or trustee of such use in the land, was made competent to contract as to the additional use proposed. That is the true statement of the case, that the city of Cincinnati held those streets in trust for public uses, having been devoted to these uses previously, and this section passed by the legislature authorized her to contract with the railroad company as to this additional use. They, as one party, were invested with power to agree upon the terms and condi-

tions upon which the additional use, as a means of carrying the grant into effect, should be enjoyed by the grantee. I do not think I can be wrong in thus stating the case as to the condition in which this party stood as trustees of previous public use. It would be the duty of the city to exact such terms and conditions as would protect the previous public use, and compensation for whatever cost or charges the new use would involve.

What would be the conditions and terms within the contemplation of the legislature? The terms and conditions were the manner of enjoying the new public use that would protect the previous uses; and if they could be protected sufficiently by directing particular acts to be done, then have a compensation that would enable Cincinnati to discharge her trust—a something either directly or indirectly connected with the subject-matter of the contract.

If the city of Cincinnati went further than to secure the purpose for which she was entitled to contract, she would be going farther than her duty required, and would, to that extent, defeat and impede the object of the legislative grant; but, having the discretion to act, if they required more or less than might compensate for the additional cost or charges, would constitute no objection to the validity of their contract. I do not stand here to claim that if the city of Cincinnati, instead of asking a reasonable sum to compensate her for the cost and charges which were incurred by the additional public use, should ask for more than was necessary to compensate her, and to discharge her duties with reference to the streets, that we can say it was unreasonable. That was in their discretion. If they charge more or less than is required to meet the additional cost and charge which the new public duty would impose, to so decide is in their discretion.

Supposing, however, they required something to be done which was in no way connected with the protection of the previous public use of the streets or with the future execution of their trust in relation thereto, could its performance be enforced? That, if your Honors please, is the question in this case; and I take it, that it can not and will not be claimed that if you are satisfied that this additional thing which they required was not for the protection of the streets, was not even connected with their use, and not connected with the trust, but was an additional thing in no way connected with their trust, that it can be enforced. It being their duty, as trustees, to require and receive a consideration, in view of the previous public use, to compensate for any loss, damage, or injury suffered by the streets in consequence of this additional public use, suppose they should require, as a consideration or as part of a consideration, something to be done for the benefit of a third person, or the payment of money to a stranger. Here, surely, would be a breach of their duty as trustees, an illegal stipulation, which neither they nor the third person or stranger could enforce. If they take something they are not entitled to, and go beyond the sphere of their duties, and contract for something that will not aid them in the discharge of their trust, to that extent they sacrifice their trust.

The point I make is this: That they may contract for something that will protect the streets, for any consideration that will come to them as trustees, so as to enable them to discharge their duties in reference to the streets. A compensation may, for instance, be paid in money, which may not at once be expended upon the streets, but it is what may be employed for that purpose—it better enables them to discharge their trust. But if the consideration stipulated

for is in no way connected with the protection of the streets from injury, and is in no way connected with anything that will enable the city to take care of the streets, then clearly it is outside of their powers. The power of the city as trustee, in this regard, is limited to the protection of the streets, and to secure some compensation which would enable it, as trustee, to discharge her duties in reference to the streets, which is to take care of them, to see that they are kept in order and repaired, and prevent obstructions.

Your Honors have decided that they could exact an annual compensation in money, because a duty would devolve upon them of keeping additional police; that as these cars would run so often, obstructions would be created, and great additional expense might be incurred by the city, as a corporate body, in keeping the streets in order in consequence of this new public use, as well as in keeping order upon the streets; and your Honors held that an additional cent might be exacted, because the money derived from it could be appropriated to a legitimate object by the city, and could be used by the city in the discharge of its trust.

When you show me a thing that does not affect the protection of the streets, that does not enable the city the better to discharge its duty in reference to the streets, then you show me a thing outside of their power. Why this thing is outside of their power, I will argue in the future. I want to settle the principle upon which the decision is to turn. I say that the parties to a contract acting in a particular capacity for a limited time, for a particular purpose, and in reference to a particular subject-matter, can not contract as to matters and considerations disconnected with their respective powers and the subject of the contract. It is useless to tell me that there are general words that em-

brace this matter. I need not say to this Court that these general words, whether in laws or contracts, can not be so extended, but must be limited; for I believe it forms a part of Lord Bacon's general maxims and rules, that they must be restricted to the fitness of the person and thing, that you can not go outside of the purpose and subject-matter, and that these general words are to be construed with reference to the purpose and the subject-matter. You can not authorize the city council to depart from the power which they are authorized to exercise.

September 4, 1866.

At the close of yesterday's session, I was proceeding to make a few remarks upon the point that the city council of Cincinnati, having in charge the streets of that city, is authorized to contract with a corporation for a new use, deemed a public use of those streets, and to exact terms and conditions. We claim that she can exact no condition that does not, or may not protect the public use of the street, or which, in its performance, does not or may not enable the city better to discharge its duties in relation to the streets of the city. That is the proposition we claim.

We claim that a consideration that does not move to the city in its corporate capacity, as having the streets in its charge, but which moves to individuals, giving them a pecuniary benefit, could not be legally exacted, and that its exaction would be a breach of trust, beyond the power of the city council to exact, and beyond the power of the street railroad company to agree to perform.

The city council had no right to contract for a consideration which did not move to the city, or which, when received, would not be received by the city—which would not

protect the streets, or enable the city to perform its functions with respect to the streets. They had no right to exact this commutation fare. It is a matter moving to individuals, and if received, would not in any way enable the city to discharge the duties imposed upon it by this additional use of the public streets. A person having a trust under his charge, and contracting for the use of it, stipulates for a thing to be done that does not pertain to the subject in any way, but goes to strangers. That can not be reclaimed for the benefit of the trust fund, neither would the person have any claim in a court of equity for compelling the execution of that thing. If the purpose for which the city council was authorized to contract was the protection of the streets, and to secure compensation for any loss sustained by reason of the new use, to the extent of such loss, and a diminishing of the compensation which might have been received for the alleged object would be a sacrifice of its trust, or would be an extortionate and illegal exaction, and in either case should not be enforced. I am considering whether this particular thing was connected with the trust or not; but I want to get your Honors' minds upon the principle that if the thing to be done was in no way connected with the subject-matter for which the contract was made, and was a benefit outside of anything which the city council could use or make available for the performance of its trust, it was a sacrifice of its trust—it was a sacrifice of its trust to that extent, and to that extent illegal; and further, it impeded the object of the legislature in making the grant, and would be an illegal and extortionate exaction.

Now, in regard to the stipulation in reference to

commutation of fares. Here is a railroad about to be constructed in the city, from one end to the other. It follows certain streets; and though the general public will ride upon those cars as occasion may require, yet it is obvious that from the nature of the thing, there are particular persons for whose benefit and for whose advantage this express stipulation was intended, and for whose personal and pecuniary benefit it operates. And now I say that the vice of this whole matter, from the beginning to the end, has been such a personal stipulation as that; and I claim that if there was nothing else in the case, it is a stipulation in a contract, or law made by the city council, which, unless you can find some express legislative authority to authorize it, is invalid, and void, upon the plainest principles of public policy. It is contrary to public policy to permit the city council, in dealing with reference to city matters, to insert in any law a stipulation which operates directly for the pecuniary interest and benefit of any class of citizens or of themselves. Does it not so operate? Is it not plain? Here is a stipulation that entitles those whose position, whose property and location will most require the use of these street railroads, to purchase their tickets at a commutation price; and the stipulation is attempted to be enforced upon the company to sell them at the reduced prices to these parties, knowing that it will operate in favor of the parties thus circumstanced. I say that such a stipulation, looking at the powers and duties of the city council in reference to the purpose and subject-matter of this contract—the character of the consideration, moving, as it does, to individuals, and giving them a pecuniary interest—renders it illegal and void, upon principles of public policy. The city council is an elective body, having power from the

State to legislate for the benefit of the city, to secure good order, and in the management and regulation of the affairs of the city. There may be cases in which it is authorized to legislate or contract in aid of the personal and pecuniary interests of individual citizens. For instance, in reference to the gas, there is a general law authorizing them to contract for gas, and fix the rate at which it shall be furnished. So with water. They are authorized to address themselves to the interest of every man who uses water or gas. But in every instance of that sort, express authority is given to make a contract of that kind.

Here, however, is a case in which there is no such authority, in which the city only acts as trustee or custodian of the streets.

You claim that there may be a stipulation that gives to parties along the line of this route, who have occasion to use it most frequently, a direct pecuniary interest in the legislation and in the contracts of the city. Now I say that in the absence of such a provision, and especially where the stipulation is not connected with the subject-matter, it is contrary to public policy that a stipulation may be introduced in either law or contract to give individual citizens a pecuniary interest in approving or sustaining the city council, or the directing of its matters.

Is it to be allowed that the members of the city council should be enabled to say to their constituents: "We have made a contract with a street railroad company for the use of the streets, and you ought to be pleased with it, because we have got in it a stipulation that will enable you and your family, that will have occasion to ride very often, to purchase packages of commutation tickets at a very low rate?" So members of the city council may reside near railroads, and may consider as of some impor-

tance the economy of their rides. It may be said to be a small matter, but I say no; the principle does not vary on account of the amount. I saw a communication in the paper, in which the writer stated that his rides upon one street railroad, near which he lived, cost him $150 per annum. Now see the difference between paying that amount and what is claimed here he should pay—a difference I believe of one-fourth. You give to every party so circumstanced a direct pecuniary interest in the government of the city council, and at the expense of the general public.

Is it right? If they are enabled to ride in this way, it affects the keeping up of the railroad; for it may have that effect. But independently of that, I put it upon the general principle, is it right? Will the Court permit, in the absence of express legislative authority, such a body as the council of Cincinnati to insert in its contracts a stipulation which will give to individuals, as individuals, a personal pecuniary interest? On the contrary, all that the city council is authorized to do, is to exact conditions for the benefit of the city. It is its duty, in its corporate capacity, to exact conditions that will enable the city to carry out the purposes of its trust, to better enable them to keep their streets in order and to remove obstructions from them, and, as decided by the Superior Court, to guard and protect the vehicles that may be passing along. That is all that the Court say they may contract for; and that is a benefit to the city. So if the streets are injured by the running of cars, it is a benefit to have them repaired.

But, in addition to that, you say that you may put in a stipulation to give Mr. A, B, or C, who resides near the routes, the privilege to ride cheap and buy his commutation tickets at a reduced rate. What is the result? Those

constituents are satisfied; and what is the further result? What has been the experience here? We all know the origin of this matter. In the year 1859, when it was proposed to establish these street railroads, there was a perfect furor; different companies were formed, and it was a very favorable time for the city council to exact conditions. They imposed them with a heavy hand, and what was the result? They were found so onerous, the exactions were so heavy, that the companies could not live under them. Complaints were made, and what was done? The companies were relieved first from one stipulation, and then from another. But from what stipulations were they relieved? From those that operated for the benefit of the city, the city will yield as to them alone; but they hung on, and still hang on with tenacity, to those that operate for the benefit of individuals, and the city is now prosecuting suits to subserve the pecuniary interests of individuals. It is admitted that the city really has no damages to claim here; that the damages, if any, go to the individual; and it is said that the city will step forward and give, for their benefit, a bond of indemnity for any loss that might be sustained by allowing them to ride at reduced rates. But when it comes to those clauses of the conditions that operate for the benefit of the city, and which are the only ones that could be legally exacted, they very generously give them up.

I have presented this out of order, because a remark of your Honor's led to it; and I ask whether it is in accordance with public policy, especially in a case where the powers of the city are limited, is it proper to create individual interests of this sort?

And it is these individual interests that have created all the trouble in reference to this matter, and that have

brought up this difficulty; it is these individual interests that have produced the collisions and breaches of the peace. When you excite in the minds of any portion of the community a personal pecuniary interest, it leads to meetings, to expression of opinions, and, as I shall endeavor to show, to illegal attempts to enforce the law, or what they conceive to be the law.

I will now pass on, having said what is necessary on that point, to the thread of my argument in another particular.

I say, in answer to what your Honor said, that the fixing of the tolls or fares to be charged on railroads, is a matter involving most deeply the interests of its stockholders and the public, and depends upon circumstances ever varying, and is not, in this case, properly a matter of contract. I claim that the statute does not authorize the city to fix the rate of toll; it is a legislative matter.

What is the life of the franchise? It is the exaction of the tolls or fares. That is the thing by which the company live. It is the life of the thing. If they are not reasonable exactions, who is to regulate them? It ought to be left to the parties themselves, and would be regulated by competition, which is open more or less. I know there was a difficulty in the organization of these railroad companies under the general law of 1852. The provisions of that law, were rather intended for long lines of railroad, and that led to a doubt in the minds of many as to whether this law applied to such a thing within the boundaries of a city. But, be that as it may, the parties acted under the law, and they were bound by the provision of the law and by the policy of the law as indicated on its face. If your Honors will turn to that law, you will find that the rates of fare

are regulated by the 13th section. It limits the rate of fare; it fixes the maximum of fare. At the time the contract was made, the only possible authority for making it was derived from the 12th section, and the 13th section of the same law regulates the fares. There was legislation upon that identical subject, regulating the fare by fixing a maximum rate of three cents per mile—at that rate every mile would be three cents. There was also a stipulation as to freight, namely, five cents per ton for thirty miles, and for any less freight it might be fixed by the company; but there was general legislation of three cents per mile.

The city council in the first place fixed the maximum of fare. They said your maximum, no matter what the distance, shall be five cents; that is their ordinance. And then, in addition to that, they attempt to insert a stipulation, by way of contract, requiring the companies to commute at the rate of twenty-five tickets for one dollar. Now, this was a legislative matter, a matter proper for legislation and not for contract, not for general contract that would extend to all the operations of the railroad and during the whole existence of its charter. Whether the city council or whether the legislature alone should legislate, it is immaterial here. I admit that it was proper for the city council to legislate; but I suppose that your Honors do not sit here to enforce legislative enactments. I take it that it is only contracts that can be specifically enforced.

The history of the legislation is simply this. The corporate organizations were all formed under the general act of May, 1852. Afterward, for some reason, it was deemed necessary or proper to get new legislation upon the subject, which was had in 1861, and that law is silent as to the rates of fare. The street railroad act does not provide anything

with reference to the rates of fare. The question is whether it was competent for the city council, acting under a law that regulates a subject-matter, as a legislative matter, to make a contract in reference to the same subject-matter, as a matter of contract. Look at the reason of the thing.

The legislature says that it is proper and convenient for the carrying on of railroads that there should be this limit to the rate of fare—three cents per mile; and it is the limit, we say, that these companies were to live under. But the city council say, you are wrong; we will make it five cents for two and a half miles. And they attempt to regulate a subject which is essentially legislative in its character, and about which, if legislative in its character, I deny the power of any council to make a contract at all. They could neither bind themselves nor others by a contract in reference to a legislative matter. Where a matter rests in the discretion of the legislative body to pass, repeal, or amend, they can not limit the power by contract. The contract would not be binding; it would be an illegal act, as an attempt to hamper and restrain the legislative power.

The city council, as I was going on to state, can not confer any corporate power—nothing in the nature of a corporate franchise or power. That is too plain to be argued. The constitution provides that even the legislature itself could not have done so. It could not have said to this company, you may have the franchise to run this road at five cents; for the constitution says you shall not confer corporate power except by general law.

All these matters with reference to the creation, organization, and government of corporations are to be regulated by general law. They come under general law, and

live by general law, subject to amendment or repeal by the legislature. This conduct, therefore, on the part of the city council, if authorized and protected by a court of justice, would be in opposition to the constitution itself. They are to be governed by general law, and not to be bound down by any contract that any municipal body or any individual may make. The life and existence of the organization are to be regulated by legislative enactments, and not by contracts with corporations or with individuals.

In this case, not only is such the general rule, but in reference to this identical matter, at the time the contract was made, there was a legislative provision. The legislature had undertaken to speak upon that subject, and said it is a matter we claim to legislate about. I ask, then, what authority can impose a different restriction from that imposed by the legislature as to the rate of fare?

I have advanced these general principles, and have said some little in reference to them. I propose now to refer to one or two authorities; but the general principle is, I think, established in the authorities. I might, doubtless, have found many more authorities than I have, but I have not thought it necessary to search for authorities in reference to those elementary principles. If your Honors do not see that this is the principle that must regulate matters of this sort, it is idle for me to go into the authorities in reference to it.

It so happens that in a case decided in 13 Ohio St., a somewhat similar question arose—the case of *The Port Clinton Co.* v. *The Cleveland R. R. Co.* The township was authorized to subscribe stock to the railroad company. Now the words there are not similar to the words here. I do not think words amount to anything.

You look at the nature and character of the subject-matter, and from that you determine whether it is germane to the point in question. In this case, the township did subscribe—they were authorized to subscribe stock to the railroad company; and what did they undertake to do? They undertook to impose terms and conditions, one of which was this—that the Toledo Railroad Company should run two lines, one by Port Clinton, and one through Norwalk to Toledo, and that both lines should be kept up and run. That was the condition, and a bill was filed for a specific performance of this contract, by Portland township, which includes the city of Sandusky. And the question arose whether it was competent for them to make in that contract such a term. I will now read what was said upon that subject:

> Where a township, through which a railroad might be located, was, by a statute, "authorized to subscribe to the stock of said railroad:" *Held*, that while, under such an authority, the contract of subscription might contain terms and conditions affecting its subject-matter, and the consideration to be paid and received, the making a subscription and paying money for stock could not be made a consideration to sustain a contract giving the township a claim to control the general conduct and discretion of the directors of the railroad company in matters involving the pecuniary interests of the company and its stockholders to an amount far exceeding the subscription of the township. It was not the intention of the legislature to authorize the township to obtain by its contract such a claim, or the directors of the company, for the time being, so to limit the power and discretion of future boards of directors.

That is the point decided by the Supreme Court.

I say your words—your language—may vary; but if your Honors have come to the conclusion that there is any limit to the terms and conditions—that they did not embrace everything—it is a direct authority to say that they

had no right, under pretense of granting the right of way through the streets, and as a compensation for the use of the streets, to insert a condition regulating the future conduct of this railroad company, or the pecuniary interests of its stockholders in reference to this matter.

We have a decision in another case that seems to bear upon this question. I refer to the cases of the *City of Cambridge* v. *Cambridge Railroad Company* and the *Mayor and Aldermen of the City of Cambridge* v. *Same*, 10 Allen, 50:

> A provision in the charter of a street railway company that, at any time after the expiration of ten years from the opening of any part of the road for use, a city may purchase of the corporation so much of the corporate property as lies within its own limits, at a specified price, does not give to the city any such interest or right as to enable it to maintain a bill in equity to restrain the corporation from raising passenger fares upon their road, in violation of conditions expressly assented to by the corporation, and imposed upon them by the mayor and aldermen of the city when granting to them the power to locate and build a new line of their railway through additional streets, if they are guilty of no fraudulent intent to destroy or depreciate the value of the corporate property; although the value of their franchise and property will be thereby diminished, and the portion of their railway constructed under such authority will perhaps be exposed to forfeiture. Nor can the mayor and aldermen of the city maintain such bill.

I will not stop now to go through this case *in extenso;* but your Honors will find that it establishes a similar principle to the one laid down in 13 Ohio State Reports—that it was an attempt by the city of Cambridge to regulate, under pretense of its corporate powers, the conduct of this corporation.

Whatever difference there may be in reference to the particular circumstances of this case, I think it is a matter of no object to inquire. The question is, do we get at a principle? And is not this principle reasonable and proper,

and sustained by these authorities?—namely, that those parties had no right, under the pretense of the exercise of this limited power conferred upon them, to assent to the use of the streets, and to impose terms and conditions in connection therewith; to act outside the subject-matter, and to legislate and contract in reference to the future conduct of this corporation and its dealings with the general public. Your Honors will apply the principle to this particular case.

As I have had occasion to observe, the facts of this case are of an extraordinary nature. Such a claim as this is a new thing; the attempt to enforce such a contract as this is a new thing; and it happens always that when a new proposition is made, something extraordinary is proposed, and in such a way as to give it force. If there is nothing else to give it force, it is given by the parties presenting it, by the great body presenting it; and behold, the great city of Cincinnati is all that gives the force to this case! If offered by an individual, it would not receive the countenance of any court for even a hearing—an argument upon it would be stopped. But when a claim of this extraordinary character, brought forward in this way, is presented, and when you are called upon to meet a claim so extraordinary that no precedent claim meets it, you have to go back to elementary principles, and ascertain what is the character and nature of the claim; and in this view I propose to go through this claim, for the purpose of showing your Honors that this thing which the city council attempts to do—without reference to its form—is, in substance, a legislative attempt; it is an attempt to enforce a legislative provision, not a contract. What do they attempt to do? Just as much as the very ordinance to limit the rate of fare, which undoubtedly assumes a legislative form,

for there is nothing about it in the contract except in general terms. But in reference to this particular provision, in its nature and character, if it amounts to anything, it is in the nature of a legislative provision and not of a contract; and when you go through its dates, details, and all the considerations connected with it, your minds will come to the irresistible conclusion that it is a law and not a contract. Whether it is a good law, it is not necessary for us to inquire.

So in reference to the law in regard to restricting the rates of fare. It may be we may have occasion to say something upon that, in order to come at the nature of the thing itself; but if it be a law, and merely a law, and not in its nature a contract, I take it that this Court does not sit here for the specific enforcement of laws.

If the city council passes a law, I think it has some other mode of enforcing it than by appealing to this Court.

There is a stipulation in the contract which requires the railroad cars to stop at a particular crossing, to cross a street before stopping. Is that a law or a contract? If a contract, it is embraced as much as the reduction of the rates of fare; for I understand the companies are bound by mortgage to comply with all the terms and conditions of this contract. And not only that, but they are bound by bond, contract, and mortgage to comply, not only with the terms in this ordinance, but with any other terms and conditions which the city council may choose to impose, with the reserved regulation to take up the rails if the terms are not complied with.

What is the object and purpose of that? Is it claimed that the city council would have authority to pass a resolution or ordinance that would take away from them some-

thing vital to the enjoyment of their right? Not at all. These are laws which they have passed. And I say it was an absurd thing to put that in the contract; it did not make it any better. If the city had bound herself not to do it, she could not do it; the terms of the contract did not restrict her. If she choose to make them stop at a different place, it is perfectly competent for her to do it. All matters in reference to the regulation of the streets are matters within the legislative power of the city council. They need not contract about them; it is idle to contract about them. If they do ever so strongly in terms, the contract would not bind them. And that brings your Honors' minds to the consideration of this particular thing. In this very matter there are matters of law and there are matters of contract; things to be done which fall under the line of contract, and things to be done which fall under the line of law.

And what is this thing? With respect to the regulating the rate of fares, it professes to be a law. It is not in the shape of a contract; it is in the shape of a law passed by an ordinance. I call it the law of the city council.

When you look at the general ordinance regulating street railroad companies, in what form do you find it? You will find the terms to be thus—that they shall not charge a greater rate of fare than so much. That is all; just in the language of the legislature, "your rate of fare shall not exceed so much." The rate of fare shall be regulated by the company, but not to exceed a particular rate. That is a law; and if it has right to pass that law, why then the city council has a right to repeal it; they may increase or reduce the rates, and pass it as a law.

Now, they come to the personal interests of those concerned; and they say that every bidder shall state the

lowest rate at which he will sell commutation tickets; and having got a bid, they put it in the contract. That stipulation is in the contract, that railroad companies shall sell those commutation tickets at such a rate. The other is a law, but this assumes the character of a contract. But I do not regard the form. Let us look at the nature of the thing; let us see what it is in its character and nature, and whether it be a law or a contract.

Let us see what the definition of a law is. It is a rule of civil conduct prescribed by a superior to an inferior. What is the meaning then? It is a general rule; it is something that applies in all similar cases, in all like transactions, to run for an indefinite period—as in a carrying business, or in doing any particular thing, you are governed by its rule or duty. For instance, coming to the provision respecting the fare, whatever may be your rate of fare, you are not to exceed a particular rate. That is the general rule for your conduct.

Now what is a contract? It is an agreement between two parties to do, or not to do, a particular thing. It is definite; it is something that does not run indefinitely; it is something limited—not so extensive. The distinction is very plain between a general rule that governs all transactions, the whole course of your business from beginning to end, and a contract to do, or not to do, a particular thing.

The question is, though the parties consent to what is law, does it make a contract? It is the nature of the thing I want to get at, with a view to ascertaining whether it fall properly within the province of this city council or not.

The contract in this case was divisible, undoubtedly. The very bringing of this suit shows that the contract was held to be divisible. It is a suit upon a particular stipula-

tion in that contract, to enforce one clause, one condition, one expression of the intent of the parties in that writing; therefore, it is claimed, and I suppose is divisible.

Then, what sign of a contract has it? And what is its consideration? What is in view of the acts of the parties, as to what they intend to do? The real intention was to prescribe these rules and regulations for the company, and to get its consent to them. But the contract is not executed by the city. If you look at the ordinance, you will find they assume to make a grant of this right of way; all that follows is in the nature of conditions accompanying this grant, conditions to be performed. If a contract, it is a condition after a grant. You receive this grant, and here is a condition we impose upon you, that you are to sell commutation tickets at a certain rate; that is one of the conditions of the grant.

The first inquiry I would make is this: Can such a condition as that run with the thing granted? They make a grant of the right of way through the streets, and it is a condition that whoever receives this grant shall sell commutation tickets at a certain price. Does it run with the thing granted? Is it a covenant that can be made to run with the grant?

Suppose the city of Cincinnati should sell out, and a man should purchase it, would he be bound by this stipulation? Not unless it runs with the thing granted, or a new contract was made with him. What is the nature of the thing that runs with the thing granted? It must be something that is beneficial to grantor and grantee. It must uphold and support the estate granted. It is not a covenant of that sort; it is a mere personal contract made with the parties; it is not a condition running with the grant.

But still the fact that it does not run with the grant is no reason why it may not be a personally valid obligation. In this case there was a personal bond or contract signed by the parties, and sureties were obtained. The resolution of the city council was a permission, whether she executed it or not, to exercise this privilege. It was in fact a grant of the right of way for the use of the streets. And the provision as to the sale of the commutation tickets is a personal obligation imposed upon the company, to comply with the stipulation; it is a personal contract.

What was the consideration of this personal contract? The gentlemen say it was that in consideration of receiving this grant of the right of way, you sell commutation tickets at $1.03; that is the only consideration. Look at its nature again in view of this definition of a contract. Is this an agreement to do, or not to do, a particular thing? The stipulation that you shall sell commutation tickets at a fixed rate, to whom was this particular thing to be done, or not to be done? Was it to do one single act in favor of Mr. A, B, or C? No; it was a general rule, regulating the sale of tickets. It is a rule prescribed for the conduct of the railroad company corporation; just the same as the negative provision, you are not to exceed a certain rate. It is for sales generally, not to a person or persons described, but it is a general regulation or law in reference to making sales.

Again, the definition requires that to a contract there should be parties, and here there were two parties. The city was one party, and the railroad corporation was the other; but they are not the parties in view of this stipulation. Who are the parties to take the benefit of this stipulation? Not the city. Where are the parties then to be benefited? To whom is performance to be made? The definition of

contract requires that there should be parties, and if the contract be in writing, they must be named in the writing, or so described that they can be identified. The only parties here in this contract are the city and the company. A contract may, in some cases, be made by A, B, and C, in which, for a consideration moving from A, a benefit is secured to C. I have not brought forward the authorities upon this subject, and I think there may be some difference between the American and the English rule; but I think the case in which it is fully considered is in 2 Metcalfe, where the consideration comes from one, and the benefit goes to another. I think they are limited to cases where there is a sort of consideration, as where A agrees with B to pay a certain amount of money for C, and C may maintain an action to obtain it. There is a *cestui que trust* in that case, which gives him a right to sue. But I think a case can not be found where there is a contract between two parties for the benefit of a third party. Unless that third party can come forward and sue, it is no contract at all, as it respects that third party. If he becomes a party to the contract, he becomes so by the form of the agreement made, and he is competent to sue upon it. If he is the party beneficially interested, he must be the party bringing the suit. He is the party for whose benefit the contract was intended. He is ascertained or ascertainable; and he is the man to sue upon it.

In this alleged contract, the persons to be benefited are neither ascertained nor ascertainable. If it be a contract with them, it is with all the world, with persons then in being, and to come into existence. Why, according to the claim of the gentleman, the child born since the date of this contract has as good a right to the benefits of it as

the oldest citizens; and the very idea that it goes to that extent, shows that it is not a contract, but a rule. It has not the necessary elements and ingredients of a contract. It is not a contract for the benefit of citizens of Cincinnati, or for the benefit of the persons of a certain locality. It is not for the benefit of the inhabitants of Cincinnati; it is for the benefit of everybody. A man from London or China has a right to come to Cincinnati, and go to the railroad company and demand the twenty-five tickets for $1.03, just as much as any citizen of this city—that is, looking at the terms of the contract; and in its terms, I say it is a law, and not a contract.

Now, as to its being a contract with those parties who propose to buy tickets, how does it stand the test when you come to regard it as a contract with them? How is it as a contract to sell tickets to A, B, or C? Suppose A, B, and C say: "It is a contract with me to sell me tickets." Here is another difficulty. A, B, and C are not bound to buy, and therefore the company is not bound to sell. There is no mutuality. In order to make a contract of sale, there must be mutuality. One man is not bound to sell unless the other man is bound to buy, and that at the time of the contract.

This matter is reported in 13 Ohio State Reports, to which I will barely refer; but your Honors will find that that principle is there laid down:

"The defendant signed a written instrument previous to the incorporation of the plaintiff, and bound himself to make the turnpike, known as the Dayton, Watervleit, and Xenia turnpike road across his farm, at the engineer's estimate, provided it crossed in a specified direction; or if he could not make it, to 'pay for it at the same rate, and take the same in stock in said royd, and have it ready by the time the rest of the road is ready for travel.'

The company, when afterward incorporated, located the road across the farm of the defendant in the direction specified in the instrument, and then built the road across the farm of the defendant, and tendered stock to the amount of the engineer's estimate for the defendant, and demanded payment. *Held*, that the contract was not binding on the defendant for want of mutuality."

There is also a case in Wendell's Reports, where a man agrees to sell to another, and says, "I will give you leave to come forward and express your option whether you will buy or not;" and it was held to be no contract, though the man came forward and wanted to buy, because they say he was not bound to buy. The terms must be concurrent.

Here it is conceded there was a part of the consideration; but the other part of the consideration was just as essential. The railroad company never agreed to sell, unless somebody agreed to buy, and pay $1.03. And I will show that, in the nature of the thing, it was not a contract with these parties, but it was a law intended for their benefit.

There has been a conflict of decisions in this State in reference to this matter of making a contract by law by these charters. We know how that is; that the Supreme Court of the United States, in an early case, decided that a State in that way might make a contract; that a State might become a contracting party with its own citizens; that its consent is indicated by a law, and its acceptance of it is the consent of the other party—that is, a contract to do or not to do a certain thing; and to that extent it is a contract, as held by the Supreme Court of the United States. Our Supreme Court differed with that decision, the last of which is overruled by the decision of the Supreme Court of the United States; but they struggled against it. They say: "No; that is not a contract. We do not want over our

acts this immunity of the federal constitution ; we want to be left free." And the convention and courts have struggled against that very principle—that an act of the legislature, dealing with its own citizens in the creation of a corporation, thereby became a contract. It has been resisted in every decision, except two or three made in the last ten or fifteen years in this State. But the Supreme Court of the United States says otherwise. Our State, however, has been struggling against it all the time; our constitution struggles against it by providing that they shall have the right to tax those corporations. There is an express provision in the constitution that it shall be done, though negatived and nullified by the decision of the Supreme Court of the United States.

Such being the public policy of this State, are your Honors prepared to say that this is a contract made by the city in the shape of a law, and throw over it this same immunity from repeal from alteration against which the legislature has been so long struggling ?

Their dealing with us is not a contract; it is a privilege given to us by the legislative will. What I maintain is this: The city council is the mere executor of the legislative will—that is, it acts under the authority of the legislature. The legislature can take it away and destroy it, but the city can not The legislature says : Agree with the city council as to the manner in which you use the streets of the city, and as to the terms and conditions for such use. And we have made that agreement, and agreed upon terms and conditions.

The thing granted does not come from the city council at all, but we have entered under authority of the law, and hold our place in the streets under the authority of the

law. If we have violated our charter, the charter can be forfeited, but not by the city council. The grant of the right to use the streets was never given by the city of Cincinnati. It came from the legislature; they authorized it to be done; it is under their authority, and not under the authority of the city council. We have no authority or right, except from the legislature.

But to return to the subject I was considering. Here is a thing in the shape of a law, and I shall endeavor to demonstrate that it was a law. Your Honor says: May not a law be a contract? Let us assume that a law may be a contract. You will observe, in reference to this very matter, that if it can be made a contract, you are throwing this same immunity over it against which this State has so long been struggling, and it will neither be competent for the city council nor for the legislature to get rid of it. Why it would have to stand as long as this railroad company exists, because it is a contract. You say it is accepted; I say it is not. The error is in mixing the two things. The grant may be accepted, but we have accepted it from the legislature. But had it been granted by the city council, it would have made no difference. Suppose they make a grant—suppose they own the streets, or grant us a lot of land they did own, and suppose they put upon it, subsequently, conditions which were illegal. The grant is good, and the conditions are void. You do not get rid of the difficulty in any manner whatever by a question of assent; you have to go back to the question of whether it was a law or whether it was a contract. If a law, these gentlemen can not enforce it by specific performance; they must make it out to be a contract. But I am arguing to

show that it is in its nature a law, and not in the sphere of the powers of the city council.

I said there must be mutuality, and that, considered as a contract with these individuals, there was not mutuality. A, B, or C says you made a contract with the city, with me, and you refuse to sell me tickets as agreed; the reply is you never agreed to ride.

It is a rule foreign to the principle of contracts to make an agreement which has nothing to do with the consideration of an agreement; it becomes a rule. You impose upon a party an obligation to sell to whoever may come forward to buy; it is a law you put upon him, and not a contract.

How does the city stand in reference to this proposed contract? I ask your Honors, is she in this case a trustee to be benefited in reference to the performance of this contract? I think it is pretty clear that if there be no *cestui que trust*, there can be no trustee. There would be nobody that could enforce a claim. The very idea of the trust involves the claim of the *cestui que trust;* and if there is no *cestui que trust*, there is no trustee. If A, B, or C, or the general public, can not enforce this claim, how can the city council enforce it for them? The thing is unanswerable; it can not be done. There is no claim upon which it can be done. If the parties intended to be benefited are placed in such a position that they can not enforce it as a contract; that it gives them no standing in a court of law or court of equity; if there is no trust, no contract created by which they are to be benefited, and which they can not enforce, it is not a contract, but a rule attempted to be enforced by a superior upon an inferior. It was a rule prescribed to regulate the sale of commutation tickets.

Let us further suppose that the city of Cincinnati, in seeking to enforce it, should say: "We are appearing here as trustees of the persons who want to ride at the rate of twenty-five tickets for $1.03; it is for them we are asking; they are our *cestuis que trust.*"

Take a different view of the case. Suppose the city of Cincinnati had not performed the trust. Would they be guilty of a breach of trust? Would they make themselves responsible in any way? Would anybody have a right of action against them? And could it be enforced? Would the city be liable to damages in law or equity for neglecting to perform this trust? If not liable for breach of trust, how are they trustees at all? And if they would be responsible, to what extent, and in what manner? What would make them responsible? And by what rule could you obtain loss or damage for neglecting this trust? I put it in either form. If this be a contract, I do not care what sort of contract, I say can it be released or discharged? And who may do this? If it be a contract, no matter how it originated, who can release or discharge it? I do not know. There may be something which I may not have seen in my experience, but I do not know that I ever heard of a contract that somebody could not release or discharge. If there be such a thing as a contract that somebody can not discharge for a consideration, I never heard of it.

Suppose that the city of Cincinnati were bought off in this matter, as the gentlemen say they were bought off in another matter. Suppose a gentleman comes to this city of Cincinnati, and says: "Here is an onerous condition. What will you take to let us off?" The city says: "I made this contract for the benefit of individuals, and yet I think I have a right to discharge it. I think I have the right to

release it; and in consideration of $5,000, or any other sum you choose to name, we will release and discharge you." And she directs the mayor to put the city seal in consideration of the $5,000 or $10,000. And to whom would the $10,000 go? That is the very question. That shows that it is not a contract, that it is not a trust; because there is no *cestui que trust.* What could you do with the $10,000, supposing it was paid?

The idea is, here is a contract; who is to discharge it? Not the parties who ride in the cars. It must be the city council then. If the city council discharges it, is it as a trust? Yes, they say so; that she discharges it, and holds it as a *cestui que trust*—as a trust to buy tickets of twenty-five in a package for $1.03, for the benefit of anybody who will ride. But how would it be executed? The suggestion of the thing is enough; that trust never could be executed. It is suggested that the money might go into the city treasury. What would be done with it, I do not undertake to say; but if it went into the treasury, it would remain there and be used for the benefit of the city. But here is a contract for the benefit of persons, and anything that could be received or collected under it is not recoverable; there could be nothing done with it to carry out the intent and purposes of the contract.

If this alleged contract with the city to do this thing is a legal one, an action of damages might be sustained upon it. Suppose the city should sue upon this contract, what damages could be recovered? The damages that the city had sustained. Could any other damages be recovered? Could the city claim any such damage as any number of persons had sustained by being made to pay two or three cents more for their package than they thought they should?

Was there ever a case known in which a party comes into a court of equity and says: "I have a contract with the defendant, but I am entitled to no damages on that contract. There is no rule or measure of damages that can be applied to it. On the contrary, if there is any damage under the contract, it is damage to other persons who are not parties to the litigation, and who are not before the court, and who can not be brought before the court or be represented, and ask the specific performance of that contract." Yet that is this case. Your Honors will see if this were a proper object. I make this remark in illustration of the claim. It is a most extraordinary claim. The very statement that I make shows that it is an extraordinary claim. I ask your Honors to call to your minds, if you can, if you ever heard or knew of an instance in which a party came into a court of equity, not as a trustee, for it can not be claimed that there is any trust here, but under a contract stipulating for no advantage to that party, but to other parties, where the damages can not be measured—damages to others, who are not before the Court and who can not be brought before the Court—and claim that it was a case for the enforcement of specific performance?

There is a class of cases in the courts where charities are enforced, charitable trusts, and things of that sort. Assuming that, if by any possible conception, this could be considered a charity, and those gentlemen who want to ride upon the road are recipients of a public charity, and it is upon that ground you are endeavoring to work out the jurisdiction here, let us see what sort of a claim that will make. Suppose it could be claimed that here is an application to establish a charity, or something of that nature—a suit for the establishment or foundation of a charity—how

would you work that out? I will illustrate to show that that is nothing else in the world but an illegal contract.

Suppose, in any case, there was a trust. It could be enforced, but at whose instance? If a public charity, the State enforces; the prosecuting attorney of the proper district or county files a bill. If there are beneficiaries, so known that they become *cestuis que trust*, a bill may be filed, and the trust enforced; but if a public charity, it can only be enforced by the Attorney-General.

No contract to found a charity was ever enforced. If there be a case to be found in any book where it was held that a mere contract could be enforced as a charity, I should like to see it. A man may bind himself as strong as he pleases to establish a charity, but the courts of equity will say, "No; we can not enforce it." The distinction is perfectly plain; it must be a trust, and the trust must be fastened upon property of some description before the Court will move. A mere contract to found a charity will never be enforced.

Therefore this particular proposition seems perfectly clear that this is not in its nature a contract. It is a mere rule or regulation which the city council sought to prescribe—a rule or regulation that can not be acted upon in behalf of those individuals, unless there is some law to enforce it; of itself, it can not be enforced as a contract. The city of Cincinnati has no interest in it; she is acting for parties who are not represented here, and who can not be; she has sustained no damage, and can sustain none; and therefore, as a contract, it has no standing in a court of equity.

These considerations further show, when you come to look at the laws and the limits of the power of the city

council, that she has exceeded them; and under pretense of making a contract, she has made a law; and that she had no right to do. She has undertaken, under authority, to make a limited contract—to make a rule as to the conduct of this railroad company; and therefore it is brought within the decision of the Supreme Court of the United States.

Here is a public body, the city council of Cincinnati, intrusted with a public function, as in the Massachusetts case—the care and custody of the streets of the city—which might have been imposed upon any body, as upon a board of supervisors, or overseers, or any body of that sort. Now, the legislature says to the railroad company, you may obtain the franchise to construct a railroad, to operate it, and collect your toll; you may be a corporation; and as a corporation you may have franchise to construct a railroad, and to charge toll, and a limit is given to the amount. As I explained yesterday, the legislature says, as a means of exercising this franchise, of securing this grant, you may go and deal with the corporate authorities of the cities or towns, and agree with them as to the terms and manner in which you shall use the streets. The use of the streets, therefore, is derived under that agreement, and under the authority given by the legislature. Now, the city council meets this party, and says, in order to secure the enjoyment of your grant, which requires land, and the use of land, we permit you to go along the streets in such a manner. And then they had the authority to impose terms and conditions; and, as I said, any term or condition they impose that appertained to the subject-matter, and was within the capacity of these parties, would be valid and binding. For instance, if, when this matter was done, these parties had agreed to pay the city of Cincinnati $10,000 in money, and

had given an obligation for the payment, that would undoubtedly have been a valid obligation, which the city could have enforced. So, I have no doubt, the stipulation contained in the original agreement to keep the streets in repair near the lines of the railroad, was perfectly valid; so your Honors have decided as to the *per capita* tax, and as to paying so much per annum for the cars.

As to the effect of the act of Congress upon this contract, we claim that by it the contract is set aside. Whatever may be the contract, it is now set aside; and we claim that we are now governed by act of Congress, which pledges us to sell tickets at the ordinary rate of fare with the percentage added, making it six cents, and packages of tickets of twenty and multiples of twenty, at the regular rates of fare. But I leave that for Mr. Ferguson, who will succeed me.

Now for a few remarks in reference to the remedy.

Assuming all that the gentlemen claim that there is a contract, or any other assumption they choose to claim, then we come to the remedy.

In reference to the remedy by injunction, I have already had occasion to remark, and I repeat it, that a party who comes into a court of equity under the claim of a contract, and asks for an injunction to restrain the conduct of a corporation, who is daily exacting what they claim to be their legal right, must themselves show a clear legal right. Your Honors must be satisfied that there is this right to interfere. Again, when a party comes in for a preliminary injunction to interfere with the operations of the railroad company, I take it that the party must show some impending injury—what would be an irreparable injury. These matters have been established, a case having arisen in this

Court, in which these principles were considered ; and your Honor, Judge Storer, will remember that they were nowhere more strongly considered than in that case, where the Court was called upon to enforce by this remedy of injunction, and the company prayed to be relieved from what they considered to be a burden. The injury must be irreparable. There is a definition of irreparable which may be cited here. An irreparable injury has been defined to be this : An injury which, in the further progress of the suit, can not be recompensed to the party in damages—that is, the party applying for the injunction will, before getting his final decree, himself sustain such damages that there can be no recompense to him. But here is a party who does not claim that it—the party and plaintiff here—will sustain this irreparable damage. There is no damage to the plaintiff at all ; not a particle. Now, is that a case in which the Court, on the ground of irreparable damage or mischief, will think fit to interfere at the instance of that party so situated, by the extraordinary remedy of injunction ?

But I pass on to another point—one which was discussed by the gentleman who opened this case, and upon which there are a good many authorities. I shall not attempt to go through with them, but propose to state simply the general results of them ; and if your Honors are not satisfied with that, I can hand you a reference to the authorities. They are too numerous to refer to now. I refer to the principles and the exceptions established.

There are, undoubtedly, cases, as claimed yesterday, in which a court has, by an injunction negative in form, but mandatory in effect, enforced the specific execution of a contract—an injunction, whether under a contract or any

other writ which is negative in form, but which in its effect, is mandatory; but it is a very dangerous species of injunction. In other words, it is contrary to that fundamental principle of law that you may do indirectly what you have no authority to do directly. And in regard to another class of cases, and the only class with which we have any concern here, I mean where you attempt to enforce the performance of personal acts—which is this case—I say that the instances in which a court of equity attempted, by a negative injunction, to enforce a specific performance of personal acts, are very few. They have been decided in different ways; and in my humble judgment, the courts of Ohio will hesitate long before they go so far as some of these cases have gone.

In a case in England, in which an actor had agreed to perform at a particular theater and not at another, the vice-chancellor decided that he could give no relief; that he could not give the remedy sought; that he could not compel him to perform; and this opinion was afterward held by the lord chancellor.

In New York, there were two cases; it was given in one case and not in another. In one case they laid down this rule: That a bird that can sing, and will not sing, ought to be made to sing. Now I say that I am opposed to that. I am opposed to doing indirectly what you do not propose to do directly; and if you have not the direct power to make the bird sing, you ought not to do it by putting the penalty upon her, unless you sing you shall starve.

I will refer to the leading case of Lumley against Wagner, 1 De Gex, Macnaghten & Gordon, 614, to show the impropriety of such jurisdiction. There was something peculiar in the singing of Miss Wagner, which could not

be compensated in money, and it was urged that therefore it was a case for enforcement of specific performance. Lord Campbell afterward dismissed the bill.

In the Port Clinton case, reported in 13 Ohio St., an effort was made on behalf of Toledo township, in which Sandusky was situated, to enjoin the Toledo Railroad to run two lines; and the Court held that the remedy could not be afforded. It was a strong case, and the sympathies of the Court were with the complainant. It was felt that Sandusky had been injured, for there was a sort of promise to run through this city, and she had subscribed for stock with that understanding; but the Court held, after the examination of all these authorities, that it could not be done. I will ask your Honors to examine, by way of argument, some of the principles upon which this decision was made; and I will undertake to say that after a very full examination of this subject, I believe there is not a case to be found anywhere, where a mere affirmative agreement to do personal acts has ever been enforced—that is, where they were personal acts, affecting merely the person, and were not confined to some definite subject-matter; where the acts were personal, as in carrying on a business, or doing things from time to time, and there was no negative covenant, has there ever been an attempt to enforce acts of that description. And every case that will be found will be a case of this character. They are like this Lumley and Wagner case, in which a Court will control the personal conduct of a party, and thus indirectly compel him to perform a service.

Where there is a contract for personal acts, and a contract not to do some act which would interfere with the contract, the Court has interfered by injunction to enforce

the not doing of the other act; but a case where a mere personal act, which did not affect some subject-matter, has been specifically enforced, I must confess I have not found. Now, the class of cases we have been referred to with which I am familiar, were cases of this sort. A man contracts to do a specified thing at a specified place, or is bound by a specific act to do or not to do a specified act at a particular place. One of the cases cited yesterday was in reference to the selling of a ship; to do no act in reference to that. So where there is a contract to do some act, as to erect a building, or some specific act on your own property—as in the case of the Virginia tavern, which I think went very far, and I think the Court has established now that it was wrong. In the case of a man contracting to build a house, you do not compel him personally to labor—you do not compel any personal act on his part; but it is an act that can be done under his direction, and not interfere with the management of his business: it is one single thing that has to be done. If a house has to be built, and if the descriptions are precise and definite, if nothing is left to the judgment of the mechanic, the Court will order the thing to be done; and when it is done, the Court sends a master to inspect it, and if he pronounces it in accordance with the order of the Court, the Court dismisses the case. Every case that can be produced will have a limit of that kind.

What I ask for is a case which shows that where the acts to be done are personal; where you call upon men to do certain things from day to day and from time to time, for fifteen or sixteen years, and call for continual personal action requiring skill and care, you can not enforce it personally or by specific performance. Can there be anything better settled? Who claims it? You can not decree

a man to perform personal service. Suppose a man binds himself ever so strongly to labor for another—to dig, to build, to work in quarries, or work on the streets; or suppose a man should bind himself to the city of Cincinnati for any time, to work upon its streets, could the city enforce it? Certainly not; there is no principle better settled. If I bind Mr. Pugh to attend to a case, can I compel his service? An agreement to do anything that makes you the servant of another, or that puts you under the control or in the condition of laborer for another, and not for yourself, can never be enforced.

How far do we depart from that practice where the acts do not pertain to a personal matter? What sort of a case is this? Is it a case of a negative covenant?

I do not want to criticise the pleadings in this case; but it does seem to me that the prayer of this bill is somewhat extraordinary. I think the bill is drawn as well as it can be drawn. It is not a want of skill in the pleader, but it is a want of proper cause. He sets out that we made a contract to sell commutation tickets, twenty-five in a package, for $1.03, and he wants a specific performance of that contract. He wants it, too, immediately. He is not willing to wait till the next term of the Superior Court; it must be done forthwith, immediately. There would be an irreparable injury unless it is enforced by a negative injunction. How would you word that injunction? I do not know any other way in which it could be worded except the one asked in the petition; and thus you ask the specific performance of a thing by restraint, or that the company shall be restrained for refusing to perform his agreement.

If the ordinance is a valid law, or suppose it were a legislative act providing that the fare shall not exceed five

cents per ticket, and we charged more than that, we would be violating the law; and a continual violation might lead to the forfeiture of our charter, and every man to whom we charged more would have a right to sue and recover the amount; but a specific performance would not apply.

The contract is to sell packages of tickets, as they claim, at one dollar for each package, to which they admit, under act of Congress, the three cents are to be added. You can not enforce it by an injunction against refusing to comply with the contract; that would not be an obligation to sell.

But apart from that difficulty, I come to the real objection. What is the character of the acts to be done? Are they not personal acts? Are they not acts requiring discretion and judgment? Are they not acts running through a long series of years, affecting daily all the persons connected with this business? Certainly they are. How then would you enforce it without a constant supervision over the acts of those parties?

It was referred to by Mr. Pugh, though not in argument, and it will be referred to by Mr. Ferguson, that it makes a serious difference to the company to sell tickets upon the cars, and you have no right to any such claim; the contract is to sell them at convenient places. And even as to convenient places, who is to fix which are convenient places?

What does the sale of tickets involve? First, the preparation of the tickets. The tickets are prepared, and the Court might say, bring them in, and we will inspect them to see if they are in proper form. The product is shown, and the Court says, I will refer it to a master to see whether it is a proper ticket. The ticket is made, exhib-

ited, and inspected, and therefore the ticket forms a part of the order; and it is ordered that you shall keep them on hand. They might be made with coupons, and therefore that matter would have to be first regulated. Next they are to be sold; and they must be kept open for sale. Where? Why at convenient points. Suppose it was on the cars, who is to sell them? We must select agents; we must have proper agents. Then, how many tickets will you furnish each car per day? And how many to each station? I might say ten; but they might soon be exhausted, although the company might have thought they would be sufficient. And so, from beginning to end, its personal acts require constant care and supervision to see that they are properly performed, and would call for the action of the Court again and again to see that they were done in a way and manner which the public may deem suitable, for differences may and will arise in reference to the price—that is, if the sale is an act which can be specifically enforced.

I have now gone through the different points of this argument, and will leave it. We claim that this contract is one which ought not to be enforced, and one which can not be, in the manner in which it is sought to be enforced in this case.